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Supreme Court, U.S.
FILED
031575 MAY 24 2004
OFFICE OF THE CLERK

No. 03-

IN THE
Supreme Court of the United States

WASHINGTON-DULLES TRANSPORTATION, LTD.,

Petitioner,

v.

WASHINGTON METROPOLITAN AIRPORTS AUTHORITY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a procurement award made by Metropolitan Washington Airports Authority to the second-best bidder in violation of the criteria set forth in the procurement was a violation of law.

2. Whether an entity required to follow federal procurement law must have or articulate any rational basis for making a procurement decision.

3. Whether in the absence of any proffer of a rational reason for contract award, the reviewing court may give deference to the agency action.

4. Whether entry of summary judgment was proper where there were substantial reasons to doubt the rationality of an agency contract award and awarding officers had clear conflicts of interest.

PARTIES

The parties to this case are those in the caption. In addition, Dulles Taxi Systems, Inc. was an intervenor below. Washington-Dulles Transportation, Ltd. is a privately held, company whose stock is not available for sale to the public or on any public market.

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Petitioner Washington-Dulles Transportation, Ltd. respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered on January 30, 2004.

OPINIONS BELOW

The January 30, 2004 opinion of the Fourth Circuit Court of Appeals (unpublished) is set out at pp. 1a-16a of the Appendix to this petition. The May 28, 2002 memorandum opinion of the United States District Court for the Eastern District of Virginia (not officially reported) is set out at pp. 17a-27a of the Appendix. The previous August 29, 2001 opinion of the Fourth Circuit Court of Appeals, which is reported at 263 F.3d 371, is set out at pp. 28a-41a of the Appendix.

JURISDICTION

The decision of the court of appeals was entered on January 30, 2004, and the denial of a petition for reconsideration and rehearing en banc, which is set out at pp. 42a-43a of the Appendix, was entered February 24, 2004. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254§§.

STATUTES AND REGULATION INVOLVED

28 U.S.C. § 49101,with relevant portions set out in the Appendix to this Petition at pp. 44a-46a.

STATEMENT OF THE CASE

Petitioner Washington-Dulles Transportation, Ltd. ("WDT") was the incumbent contractor for taxicab services at Dulles International Airport near Washington, D.C. The taxicab concession at Dulles is awarded to a single company by the entity, which operates Dulles Airport, the Metropolitan Washington Airports Authority ("MWAA"). MWAA published a Request for Procurement, RFP-99-01, requesting bidders for the next three years, with an optional two-year extension. WDT

submitted a proposal and bid in full compliance with the RFP. The proposal was reviewed by the MWAA staff, and, exactly like every other proposal, was awarded points as directed by the RFP. WDT scored the highest number of points and was found to be the best qualified bidder according to the evaluation criteria of the RFP.

Following the evaluation of bids, the Board of Directors of MWAA held an executive meeting in secret session. At the meeting, they chose another bidder, Dulles Taxi Systems, Inc. ("DTS"). WDT was informed that it was entitled to a debriefing as to the reasons it was not chosen, but later was told that it could have no such briefing. MWAA declared that it had the sole and exclusive right to choose any bidder it wanted, and that it was not required to give a reason for its choice.

MWAA takes its existence from an interstate compact and an Act of Congress.[1] WDT filed an action in the United States District Court for the Eastern District of Virginia contending that MWAA failed to follow "full and open competition," 49 U.S.C. § 49104(a)(4)§§, and failed to comply with the provisions of its Lease. The District Court initially held that WDT lacked standing to bring the action, and that jurisdiction in the case was not proper in the federal courts. The District Court decided that it could look only at whether MWAA had *adopted* sound procurement regulations, not whether MWAA had *complied with* such regulations. The Fourth Circuit reversed and remanded, holding that according to the plain language of the Enabling Act, federal district courts "have

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[1] As fully set out in *Washington-Dulles Transportation, Limited v. Metropolitan Washington Airports Authority*, 263 F.3d 371 (4th Cir. 08/29/2001), *hereinafter WDT v. MWAA* and included at Pet. App. P. 28a-41a, the compact was between Virginia, Maryland, and the District of Columbia, and the Act of Congress was the Enabling Act, 49 U.S.C. §§ 49101 *et seq.* *See* Pet. App. pp. 30a-32a.

jurisdiction to compel [MWAA] and its employees to *comply with the terms of the lease."* 263 F.2d 371, 374, emphasis in original.

Following the remand, the parties undertook discovery. During discovery, MWAA took the position that none of its employees or officers or directors could testify about anything whatsoever which happened during so-called "executive sessions", and MWAA refused to provide any discovery regarding the reasons why it chose a bidder who was less qualified. For example, during the deposition of Mr. William Hazel, an MWAA director, the following exchange took place:

> Q [to Mr. Hazel]: Were you involved in a straw vote which resulted in a 5-4 decision to award the contract to WDT?
>
> OBJECTION [by MWAA counsel]: Again, renew my objection to the extent that that involves any discussion in an executive session and ask that Mr. Hazel not answer the question.

A similar objection and direction not to answer was made during the deposition of Mr. Keith Meurlin (another MWAA director):

> Q: And did you participate when the paper was presented to the Board?
>
> A: Yes. I was there.
>
> Q: And would you please tell us what happened at that time?
>
> OBJECTION: Objection. To the extent that calls for your participation in any executive sessions, I would direct the witness not to respond based on a continuing assertion of privilege with respect to such sessions. [p38]

WDT filed two motions to compel and both parties filed cross-motions for summary judgment. The motions to compel were denied and what happened during executive session shall forever remain secret. Nevertheless, MWAA was unable, at any time, to give or even to suggest any reason why it chose the second-best qualified vendor over the most qualified.

REASONS FOR GRANTING THE WRIT

Regularity, Reason and Rationality are Critical to Government Contracting and to Good Government

Regularity and the enforcement of government contracting principles foster competition, limit government spending, and prevent corruption. The unfettered power to make arbitrary awards from the public treasury does the opposite. One of the early acts of the Bush administration was to repeal a rule enacted at the end of the Clinton presidency, a rule which gave government contracting officers the ability to deny awards to contractors who had, in their view, exhibited "corporate irresponsibility." The notice of repeal, published in the April 3, 2001 Federal Register, correctly stated that the prior Clinton rule did not provide "contracting officers with sufficient guidelines to prevent arbitrary or otherwise abusive implementation", and the final repeal was published in 66 Federal Register No. 248, Dec. 27, 2001.

The Bush administration was right. Rules which give contracting officers and agencies free discretion and the use of fuzzy non-specific criteria invite arbitrary government action, foster favoritism, permit unfair discrimination, and ultimately result in corruption.

This is a case where a quasi-government agency acting in a closed "executive session" and in violation of its own contracting rules and RFP requirements declined to award a contract to a controversial Afghan immigrant who was also the

highest-qualified bidder. The awarding entity, MWAA, was given control of Dulles, Reagan National and Baltimore Washington airports by Congress, which directed that it must be limited in its contracting power by following established procurement regulations and sound contracting principles. These principles included fully competitive bidding. Nevertheless, a contract worth millions of dollars per year was awarded to a newly formed group of investors and new hires that included among its numbers a recent MWAA Board member used as a consultant in the group's dealings with MWAA. It was awarded with the participation of another Board member with a clear conflict of interest.[2] It was awarded in violation of the criteria in the RFP, in a closed "executive session." The award was nevertheless upheld by both the district court and the court of appeals by citing the requirement for courts to give deference to a supposed agency decision-making process.

WDT was founded and is largely owned and operated by Farouk Massoud, an Afgan immigrant to the United States. During the years in which his company held the Dulles taxicab concession, Mr. Massoud and WDT operated it without any significant complaints and, in fact, achieved several awards from MWAA for its assistance to MWAA and for its passenger service and reliability. When the taxicab contract was awarded to a company called Dulles Taxi Systems, Inc., Mr. Massoud asked to know why, and he was told that by the MWAA staff he was entitled to a debriefing. MWAA later determined that it would not give him a briefing and that it was under no obligation to explain to him, or to anyone, why it made the award.

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[2] One of the members of the Board, the strongest proponent of the winning bidder, was employed by the law firm that represented DTS before MWAA, and did not disclose this conflict at the time.

It was nothing less than astonishing to read the Fourth Circuit's contention that the reason for awarding the taxicab concession to the less qualified bidder was that the MWAA Board of Directors had considered WDT's "past performance" as a factor that the MWAA staff had neglected. It was more astonishing because the bidder to whom the award was made, DTS, had no past performance whatsoever. MWAA itself never claimed that the basis for its decision was "past performance"; instead it asserted repeatedly that it need give no basis other than its complete discretion.

In the open meeting of the Business Administration Committee on March 29, 2000, prior to Amendment No. 6, Board member Jeffrey Earl Thompson gave the clearest statement of what the problem with WDT might be, almost immediately after coming out of closed-session:

> "I echo the motion proposed by Bo [Director Robert Young] and seconded by Weldon in the perspective that the public perception of the operations at Dulles and the fact that who the operator is directly, indirectly represents a significant public service perspective of this Authority, and given all the discourse that has occurred, et cetera, et cetera, the problems that have been experienced, I think selection of number 2 is welcome." [sic]

There is no doubt that Mr. Farouk Massoud's company was the subject of some controversy (including a 1999 Washington Business Journal article calling him the "King of Dulles" and a Loudoun Times-Mirror article in 1999 with the subtitle "Ethnic divisions surface at Dulles Airport)." The taxicab drivers complained to the media about Mr. Farouk Massoud and about how hard a taskmaster he was to them. At one point he fired a significant number of drivers and sent tow-trucks to their homes to reclaim the cabs (which were WDT's

property). Prior to and during the procurement process, MWAA investigated driver complaints about Mr. Massoud, and the staff of MWAA determined that these complaints were, without exception, unfounded.

The "public perception of the operations at Dulles," to use Mr. Thompson's language, were not a proper consideration of the RFP process. This was confirmed at the same meeting by Mr. Edward S. Faggen, General Counsel of MWAA. Mr. Thompson then revised his remarks to say, "let's strike the word 'perception.' The facts are ... do more investigation of these articles..." [sic]

Director David Ralston, Chairman of the Board and a Washington, D.C. government contracts attorney, raised the same concern at the same meeting, pointing out that the Business Administration Committee had made a choice which was simply not supported by the RFP, and was not an evaluation criterion. After WDT notified MWAA that it was protesting the decision, the Board of MWAA issued the notorious "Amendment No. 6."

This "Amendment" stated that "past experience" had a "critical role" in the "ability of a proponent to develop and successfully implement Operating and Management Plans." It requested the bidders to answer five questions, but stated that the results would "not be used to re-score the previously submitted proposals" but instead would be "used as the Committee deems appropriate." The "Amendment" also stated that "[t]o the extent that this amendment is inconsistent with other provisions of the solicitation, this amendment shall control." To make the matter perfectly clear, the amendment changed the scoring and award mechanism so that "the relevant evaluation criteria set forth in the solicitation" would serve only as a guide to the Committee in "the required exercise of its discretion" to "recommend to the Board the proposal which, in

the Committee's sole judgment, best meets the overall requirements of the Authority..." In other words, a carefully designed evaluation and rationally based solicitation was, after the recipient was chosen and announced, replaced with a system where the whim of the Airport Authority's Board and Business Committee would be the only rule.

Both WDT and DTS provided answers to the Amendment No. 6 questions. The Business Administration Committee in fact noted that WDT provided extensive information,[3] but also commented, without explanation, that the material that WDT provided had reinforced its original decision. The Business Administration Committee later commented that it had exercised its discretion (a clear reference to the language of Amendment No. 6), using the RFP's evaluation criteria only as a guide, to discover that it had been right all along in choosing DTS over WDT. Never, at any time, did the Business Administration Committee or the Board of MWAA give a rational basis for its decision.[4]

Amendment No. 6 was nothing less than a cover-up by MWAA to justify its award to a company with connections to the MWAA Board of Directors. It was an after-the-fact attempt to pretend that the Authority was engaging in further fact-finding when, in truth, the Board had made its decision. It did, however, amend the solicitation document by removing the requirement for an objective evaluation, and it did after the award had been announced. The conclusion is inescapable that it did this solely to provide a legal basis for removing Mr. Massoud, an Afghan immigrant who had become the subject of attacks by some disaffected minority cabdrivers and who had

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[3] DTS was a startup company, so that most of the questions logically could have nothing to do with DTS operations at Dulles Airport.

[4] At oral argument in the Fourth Circuit, counsel for MWAA was again unable to provide the basis for the Committee's or the Board's choice.

been the subject of an unfavorable and unjustified media campaign.

During the period that this case was in litigation, the United States General Accounting Office (GAO) issued a report of MWAA's contracting practices.[5] The title of the report to Congress was "Metropolitan Washington Airports Authority Contracting Practices Do Not Always Comply with Airport Lease Requirements" (March 2002)." While the contracts audited by the GAO did not include concession contracts, it is clear that the criticism in the report applies equally to such contracts. In fact, "Recommendation 1 for executive action" is that MWAA's Board of Directors take steps to ensure that MWAA published "procedures for competitively awarding contracts in excess of $200,000 and ***all of its contracts for concession franchises*** and that MWAA publishes—and makes available to the public—a complete, accurate and current set of its contracting procedures." *Id.* at 37 (emphasis added). The GAO Report specifically mentions this case at page 34, footnote 37, pointing out that MWAA had misrepresented an earlier GAO report in various court proceedings, including this case, by affirming that GAO agreed that MWAA had complied with contracting requirements, when GAO had said that MWAA had not complied. GAO, in its report, concurred with the Fourth Circuit's direction in the first appeal in this case, *Washington-Dulles Transportation,*

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[5] The review was pursuant to the authority given GAO by the Enabling Act and was issued after an extensive review of MWAA procurement practices. The expertise of the GAO in this area has long been recognized by the courts, *M. Steinthal & Co. v. Seamans*, 147 U.S. App. D.C. 221, 455 F.2d 1289, 1305 (D.C. Cir. 1971), deriving from its long experience in settling contract-related public accounts and its practice of providing pre-expenditure advice regarding the legitimacy of contract awards. *See* A. GALLAGHER, THE LAW OF FEDERAL NEGOTIATED CONTRACT FORMATION 344-346 (1981).

Ltd. v. Metropolitan Washington Airports Authority, 263 F.3d 371 that MWAA use competitive procedures, not merely put them on paper. *Id.* at 376.

The GAO report states that, although the precepts of competitive public contracting owe much to the federal government's experience, the fundamental principles outlined are "not unique to federal contracting practice. The principles find expression, for example, in the American Bar Association's (ABA) PRINCIPLES OF COMPETITION IN PUBLIC PROCUREMENTS as well as in the ABA's MODEL PROCUREMENT CODE FOR STATE AND LOCAL GOVERNMENTS, adopted in 1979 and updated in 2000. Sixteen states, *including Virginia*, have adopted the model code". *Id.* at 48-49. Emphasis added. [JA:2359-2360]

The GAO concluded that, to achieve full and open competition, MWAA must change its way of operating so that prospective MWAA contractors are able to prepare and submit appropriate bids or proposals in response to an *identified* contract requirement. To help ensure that contract awards are not arbitrary or preferential and to protect the integrity of the competitive process, GAO stated that MWAA must write specific bidding procedures and, more importantly, follow them. *Id.* at 49. The award, in secret session, of a multi-million dollar contract to the less-qualified bidder, followed by the issuance of an ad hoc "Amendment No. 6" replacing the RFP's carefully drafted award criteria with a system of whimsy and unprincipled discretion does not meet the important objectives and requirements of the GAO Report and does not serve the public's interest in full and open competition in government contracting.

In an age where allegations of insider trading and self-dealing are becoming commonplace, and where public perception is that government contracts are awarded to

associates of the incumbent administration, it is critical for the standards of fair and open competition in government contracting to be clear. The courts are the ultimate enforcers of these standards. Nevertheless, both the district court and the court of appeals were apparently persuaded by the language in the RFP that MWAA had "sole judgment" and unfettered discretion to acquire the services otherwise than in the RFP when MWAA decided that it was in its interest to do so.[6]

This Court should take this opportunity to clarify that, in government contracts law, merely inserting into a procurement document such phrases as "sole judgment" and "unfettered discretion" does not relieve a public body of the requirement, imposed by Congress, to draft specific bidding procedures and regulations, and, as the GAO points out, follow them.

The Ruling of the Fourth Circuit is Contradictory to Rulings in the District of Columbia and the Federal Circuit.

As the Fourth Circuit noted[7], in a case where the plaintiff/bidder claims an agency action to be arbitrary, the "disappointed bidder bears the heavy burden of establishing in court that the decision by [a] government agency either had no rational basis or involved a clear and prejudicial violation of applicable statutes or regulations," and "WDT was required to 'demonstrate prejudice attributable to either (a) the procurement procedures were a violation of applicable statutes

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[6] Pet. App. p. 14a (court of appeal); Pet. App. p. 24a (district court). The district court's grant of summary judgment to MWAA was, however, based on a different theory—that WDT was disqualified from bidding. This issue was not raised in the pleadings and was not at issue in the case. It was not relied upon by the court of appeals.

[7] Pet. App. p. 12a, citing *Newport News Shipbuilding & Dry Dock Co. v. General Dynamics Corp.*, 960 F.2d, 386, 392. (4th Cir. 1992).

or regulations, or (2) an arbitrary or irrational decision of the procurement official on matters primarily committed to his discretion.'"[8]

Both were the case here. First DTS was chosen as a winning bidder in violation of the criteria set forth in the RFP and the procurement regulations of MWAA. Then, after the fact, the RFP was "amended" by Amendment No. 6 to justify the selection. Amendment No. 6 provided that MWAA's Business Administration Committee could choose, in its sole discretion and for any reason, any bidder it wanted. The wording of Amendment No. 6 permitted, and even mandated, an arbitrary decision process.

The Fourth Circuit suggested that the rational basis for MWAA's determination to pick the second-best bidder was the "past performance" of WDT. There is no support for that suggestion in the record of the case. Indeed, the RFP set out six evaluation criteria. These were: (1) operating plan; (2) management plan; (3) plan to achieve a minimum 10% participation by non-flyer taxicabs; (4) industry experience and qualifications; (5) financial offer and ability to perform; and (6) proposed disadvantaged business enterprise participation.

In none of these criteria, nor in their written descriptions in the RFP, does one find "past performance" of the vendor as any part of the evaluation criteria. One might argue that it could be included under industry experience and qualifications, but in that area, the MWAA staff's Business Administration Committee Report, dated March 2000, scored WDT with an "outstanding" evaluation, and added a note that WDT was "twice recognized by the Airport Ground Transportation Association as the number one airport taxi operator in the U.S. in management, operation, and customer service." Furthermore,

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[8] *Ibid.*

the Committee Reports from the Business Administration Committee did not identify this as the area in which "past performance" might be found.[9]

In permitting MWAA to adopt, after the award, a "past performance" standard for evaluating and comparing proposals, the Fourth Circuit has disregarded clearly established government contracting law, primarily developed by the District of Columbia and the Federal Circuit. Past performance standards, more properly called contractor responsibility standards, exist in government contracting, and they are made after proposal evaluation (as here) to determine whether a bidder has the capacity to do the work. Cf. 41 C.F.R. § 1-1.1203-1 (1983)§§; *Delta Data Systems v. William H. Webster*, D.C. Cir. Nos. 84-5356, 84-5362 (1984)[10]. However, they are not used as comparative evaluation criteria. There are, as the D.C. Circuit commented in *Delta Data Systems*, no gradations: the contractor is either responsible or non-responsible. If the contractor is not responsible, then the award may be made to the second most qualified, but there are procedural safeguards and appellate processes to contest the agency's determination by well-defined responsibility standards.

The test for reviewing courts is to determine whether "the contracting agency provided a coherent and reasonable explanation of its exercise of discretion," *Id.*, and the "disappointed bidder bears a 'heavy burden' of showing that

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[9] In the Business Committee meeting of March 29, 2000, the Board members themselves were unable to agree on a reason why DTS was chosen over WDT.

[10] *See also Air Terminal Services, Inc. v. Department of Transportation*, 400 F. Supp. 1029 (D.D.C. 1973), aff'd, 169 U.S. App. D.C. 297, 515 F.2d 1014 (D.C. Cir. 1975).

the award decision 'had no rational basis.'" *Saratoga Dev. Corp. v. United States*, 21 F.3d 445, 456 (D.C. Cir. 1994).

In awarding the contract, and in defending its decision if challenged, an agency is bound to follow the criteria set forth in an RFP. *Dynalantic Corp. v. U.S.*, No. 91-1162 (Fed. Cir. 09/10/1991); *Elcon Enterprises, Inc., v. Washington Metropolitan Airports Authority*, 977 F.2d 1472, 1481 (D.C. Cir. 1992). It has never, with the exception of the Fourth Circuit's decision, been sufficient to claim that the agency, by virtue of a late amendment to the RFP, had complete discretion to make any award it chooses. However, the Fourth Circuit has developed a line of cases to this effect.

Where, as here, an agency declines to provide reasons for its decisions other than to point to its own discretion, courts are not bound to give the agency deference in the decision making process. *See Home Box Office, Inc. v. FCC*, 185 U.S. App. D.C. 142, 567 F.2d 9 at 54-55 (D.C. Cir. 1977) (involving an ex parte contract)[11] This Court has held that meaningful judicial review may require that reasons for agency decisions, if they exist, must be given during litigation reviewing those decisions. *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990); *Camp v. Pitts*, 411 U.S. 138, 142, 142-143 (1973); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

The rule established by the Federal Circuit and the District of Columbia Court of Appeals is that, after an unsuccessful bidder has made a threshold showing, such as demonstrating

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[11] "Where, as here, an agency justifies its actions by reference only to information in the public file while failing to disclose the substance of other relevant information that has been presented to it, a reviewing court cannot presume that the agency has acted properly, but must treat the agency's justifications as a fictional account of the actual decision making process and must perforce find its actions" *Ibid.*

that a lesser qualified bidder was chosen, then the court must require some explanation from the awarding agency. None was given in this case, and instead MWAA was permitted to hide its award-making process behind the secrecy of Executive Session privilege.[12] This is inconsistent with the laws regarding proper government contracting practices established by the District of Columbia Circuit and the Federal Circuit.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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[12] The parties had entered into a detailed protective order that protected any confidential information of MWAA. There was no realistic danger of disclosure of this information. *See, e.g., Henson v. Wyeth Laboratories, Inc.*, 118 F.R.D. 584 (W.D. Va. 1987).